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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-683

STATE OF MISSOURI,
Petitioner,

vs.

ALL STAR NEWS AGENCY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

STATE OF MISSOURI,
Petitioner,

vs.

ALL STAR NEWS AGENCY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioner, the State of Missouri, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Missouri entered in the above-entitled cause on October 10, 1979.

OPINION BELOW

The opinion of the Supreme Court of Missouri, as yet unreported, is styled and numbered as follows: State of Missouri, Respondent v. All Star News Agency, Inc., Appellant (2 cases), No. 61,317 in the Supreme Court of

Missouri. A copy of the opinion is reprinted as Appendix A.

The decision of the Supreme Court of Missouri in this cause is based solely upon a recent decision in the same court involving the same parties and closely similar facts, *State v. All Star News Agency, Inc.*, reported at 580 S.W. 2d 245 (Mo. banc 1979), in which a petition for a writ of certiorari is also pending before this Court. A copy of this decision is reprinted in Appendix B.

JURISDICTION

Judgment was entered in this cause by the Supreme Court of Missouri on October 10, 1979. Inasmuch as the issues presented herein were considered by the Supreme Court of Missouri in a previous case (see Appendix B) and the court's ruling in the present cause was based upon its prior decision, no motion for rehearing was filed. The present petition is filed within ninety days of the entry of judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether § 542.281.5, RSMo 1975 Supp., necessarily imposes a constitutionally impermissible prior restraint on materials presumptively protected by the First Amendment to the United States Constitution.

2. Whether the restraint of presumptively protected materials for a ten-day period prior to the commencement of an adversary hearing to determine whether there is probable cause to believe that those materials are obscene constitutes a constitutionally impermissible prior restraint.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment, reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitution, Fourth Amendment, reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Fourteenth Amendment, reads in pertinent part as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 542.281 and 542.301, RSMo 1975 Supp., are set forth in Appendix C.

STATEMENT OF THE CASE

The legislative scheme at issue in this cause may be aptly summarized by the following quotation from the decision of the Supreme Court of Missouri in *State v. All Star News Agency, Inc.*, 580 S.W.2d 245 (Mo. banc 1979), a previous case involving the identical parties and issues (see Appendix B):

> "The statutes involved provide a civil procedure whereby the State may search for, seize, and destroy obscene material. In general terms they provide, where twenty or more items are at issue, for a four-stage process. First, upon application of the State to a court for a warrant to search for and seize obscene material, the dealer or exhibitor of the obscene matter must be given notice and an adversary hearing. Once notice is received, any removal or alteration of the material at issue is punishable by contempt. Second, an adversary hearing must be held before a search warrant for such material may issue. The purpose of the hearing is to determine whether there is probable cause to believe that the material is located where alleged and will ultimately be found to be obscene. Third, if the warrant issues, a determination of obscenity is made by an advisory jury. Fourth, the trial judge determines, after the jury verdict, whether the material is obscene or not obscene as a matter of law. If the material is obscene, an order of forfeiture and destruction issues." *State v. All Star News Agency, Inc., supra,* at 246-247.

In the case at bar, respondent, a wholesale distributor of magazines, films and books in St. Louis, was served with a notice of adversary hearing pursuant to § 542.281,

RSMo 1975 Supp., on June 6, 1977. The notice listed and described the materials for which a search warrant was being sought and in substance stated, as provided for by § 542.281.5, that "After service of notice of the hearing, intentional alteration, destruction, or removal of any matter, or duplicate of matter, described in the notice shall be punished as contempt of court." Police officers were stationed at respondent's warehouse to ensure that none of the described material was removed.

On June 8, 1977, an adversary hearing on petitioner's application for a search warrant was conducted in the Circuit Court of the City of St. Louis; on June 16, within the ten-day limit set by § 542.281, the court found probable cause and ordered that a search warrant issue. On that date, respondent's warehouse was searched pursuant to the warrant and approximately 26,000 magazines and 2,000 movies named or described in the warrant were seized. Following a hearing lasting more than two months, in which the seized materials were examined by a jury and independently reviewed by the court, virtually all of the items submitted were found to be obscene and their destruction was ordered. Both parties appealed the Circuit Court's decision to the Missouri Court of Appeals, Eastern District, respondent contesting the validity of the statutory procedure and alleging numerous due process violations, and petitioner disputing the court's holding that 35 specific exhibits which were found to be obscene by the jury were not obscene as a matter of law.

Following an opinion by the Missouri Court of Appeals which reversed the lower court on both appeals, the Supreme Court of Missouri granted respondent's motion to transfer the cause to that court. In an opinion issued on October 10, 1979, the Supreme Court of Missouri reversed

on respondent's appeal and remanded the cause,[1] premising its decision on the conclusion that the materials in question had been subjected to a constitutionally impermissible prior restraint between the time the notice of adversary hearing was served and the time the request for search warrant was ruled upon, a period of ten days. A writ of certiorari to the Supreme Court of Missouri is being sought pursuant to 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE WRIT

Petitioner submits that a writ of certiorari should issue in the case at bar for the reason that, in reversing the decision of the Circuit Court of the City of St. Louis, the Supreme Court of Missouri disregarded the entire body of the decisional law of this Court regarding prior restraints and misinterpreted the decisions of this Court relating to the restriction of obscenity.[2] In doing so, the Supreme Court of Missouri has emasculated a statutory scheme, the civil statute providing for the seizure and destruction of obscene materials, whose fundamental validity (independent of due process defects in its execution) has been implicitly upheld by this Court in numerous past decisions, *Lo-Ji Sales, Inc. v. New York,* ..... U.S. ....., 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); *Marcus v. Search Warrant,* 367 U.S. 717, 81 S.Ct.

1. The decision of the Missouri Supreme Court did not explicitly rule upon the appeal of petitioner; however, it may be inferred from the court's ruling that the lower court's order at issue was affirmed.

2. In view of the fact that the Missouri Supreme Court advanced no argument in the present decision, but rather relied solely upon its previous decision in *State v. All Star News Agency, Inc.,* 580 S.W.2d 245 (Mo. banc 1979) (see Appendix B), this petition will dismiss the holding and rationale of that prior decision.

1708, 6 L.Ed.2d 1127 (1961), and which is presently in use in numerous states. *See, e.g.,* McKinney's Cons. Laws of N.Y., Civil Practice Law and Rules § 6330 (1972 Supp.); Fla.Stat.Ann. § 847.011 (1976); Arizona Rev.Stat. § 13-3501 (rev. 1978). As the sole basis for its holding, the Missouri Supreme Court cites the First, Fourth, and Fourteenth Amendments to the United States Constitution and the decisions of this Court interpreting those amendments. As noted by this Court in *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975),

> "a State is free as a matter of its *own law* to impose greater restriction on police activity than those this Court holds to be necessary upon Federal Constitutional standards [citations omitted] but, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Id.,* 420 U.S. at 719.

See also North Carolina v. Butler, ... U.S. ....., 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979).

The crux of the Missouri Supreme Court's holding in this and in the previous *All Star* cases is that the provision in § 542.281.5, RSMo 1975 Supp., which prohibits the alteration, destruction or removal of materials described in the application for search warrant during the maximum ten-day period between the application and the ruling on that application constitutes an impermissible prior restraint which violates the distributor's First Amendment rights. The constitutional issue of prior restraints has been extensively handled in the decisions of this Court: while it has long been recognized that any system of prior restraint bears a heavy presumption against its constitutional validity, *Bantam Books v. Sulli-*

van, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1964), prior restraints are not unconstitutional *per se*. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Times Film Corporation v. Chicago*, 365 U.S. 43, 47, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). The most recent statement of the requisite circumstances for a valid prior restraint is contained in *Southeastern Promotions, Ltd. v. Conrad, supra*:

> "In order to be held lawful [the prior restraint], first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech" (citation omitted). *Id.*, 420 U.S. at 559.

One such exception to the prior restraint prohibition relates to the field of obscenity prosecution: this Court has stated that "the primary requirements of decency may be enforced against obscene publications." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). This exception formed the basis for the upholding of a prior restraint by the Court in *Times Film Corp. v. Chicago, supra*: there, the distributor of a film entitled "Don Juan" refused to submit the film for examination to city officials, as required by city ordinance, before a permit to publicly exhibit the film could be issued. In upholding this procedure, the Court stated as follows:

> "[Petitioner's argument] is founded upon the claim of absolute privilege against prior restraint under the First Amendment—a claim without sanction in our cases. To illustrate its fallacy, we need only point

> to one of the 'exceptional cases' which Chief Justice Hughes enumerated in *Near v. Minnesota, supra*, namely, 'the primary requirements of decency [that] may be enforced against obscene publications.' . . . Chicago emphasizes here its duty to protect its people against the danger of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent of, such an evil, previous restraint cannot be justified. With this we cannot agree." *Times Film Corp. v. Chicago, supra*, 365 U.S. at 49.

It should be emphasized that this prior restraint exception attaches to the *public policy* of policing the bounds of obscenity and does not depend upon whether the items at issue have in fact been determined to be obscene; in the *Times Film Corp.* case, for example, the film in question was never examined for obscenity by the appropriate city officials or by any of the reviewing courts. 365 U.S. at 46-47; *see also Kingsley Books, Inc. v. Brown, supra*, 354 U.S. at 440-445. Accordingly, respondent submits, the prior restraint in the case at bar is clearly within the above-quoted exception to the prohibition of such restraints.

The necessary procedural safeguards for lawful prior restraints have been well-delineated by a number of decisions by this Court:

> "*First*, the burden of instituting judicial proceedings, and or proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured" (emphasis in original). *Southeastern Promotions, Ltd. v. Conrad, supra*, 420 U.S. at 560.

See also Blount v. Rizzi, 400 U.S. 410, 417, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); *Freedman v. Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). All three requirements are clearly satisfied in the case at bar. There can be no dispute that, under the statutory scheme of the Missouri civil anti-obscenity statute, petitioner was required to initiate the proceedings and to establish that the items at issue were in fact obscene. The second requirement is similarly satisfied by the fact that the statutory restraint at issue lasts only through the adversary search warrant hearing, which must be (and was in the present case) concluded within ten days of the warrant application. Section 542.281.5, RSMo 1975 Supp. *Cf. Blount v. Rizzi, supra*, 400 U.S. at 418; *Teitel Film Corporation v. Cusack*, 390 U.S. 139, 141-142, 88 S.Ct. 754, 19 L.Ed.2d 966 (1968); *Freedman v. Maryland, supra*, 380 U.S. at 60. Such a ten-day delay pending judicial review has been implicitly found to be reasonable. See *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). As to the third procedural requirement of a prompt final judicial determination, § 542.301.3(1) requires that "[e]xcept when the dealer, exhibiter, or displayer consents to a longer period, or by his actions or pleadings wilfully presents the prompt resolution of the hearsay, judgment shall be rendered within ten days of the return of the warrant." Since the prior restraint imposed by statute during the adversary search warrant hearing came within the subject-matter class of exceptions to the general prohibition of such restraints, and since all necessary procedural requirements were provided for under the statute, petitioner urges that the prior restraint at issue was a valid and proper one and that the holding of the Missouri Supreme Court is without merit.

In support of its decision in the first *All Star* case (Appendix B), the Supreme Court of Missouri cites five "teach-

ings" which it claims to find in the decisions of this Court on the subject of obscenity. *State v. All Star News Agency, Inc., supra*, at 247. Briefly summarized, these "teachings" are that, while "as a general proposition, no restraint on dissemination of presumptively protected material prior to a judicial adversary hearing on the question of probable obscenity is permitted," *single copies* of magazines or films may be restrained for purpose of a probable obscenity determination. *Id.* Petitioner has searched the prior restraint decisions of this Court in vain for language supporting the Missouri Supreme Court's holding that the First Amendment prohibits the restraint of more than one copy of a given item. *See Southeastern Promotions, Ltd. v. Conrad, supra*, 420 U.S. at 560; *Blount v. Rizzi, supra*, 400 U.S. at 417; *Freedman v. Maryland, supra*, 380 U.S. at 58-59. The only case which even refers to the *possibility* of a single-copy seizure is *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973); there, the seizure of a single copy of a film pursuant to an *ex parte* warrant was attacked by the film distributor as being contrary to the holdings of *A Quantity of Books v. Kansas, supra*, and *Marcus v. Search Warrant, supra*. In response to this argument, this Court stated as follows:

> "Petitioner's reliance on [these decisions] is misplaced. Those cases concerned the seizure of large quantities of books for the sole purpose of their destruction, and this Court held that, in those circumstances, a prior judicial determination of obscenity in an *adversary* proceeding was required . . . . We do not disturb this holding.
>
> * * *
>
> But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide*

> purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate . . ., the seizure is constitutionally permissible" (emphasis supplied; citations and footnotes omitted). *Heller v. New York, supra,* 413 U.S. at 492.

In short, the holding of *Heller* is *not* that only single copies of an item may be restrained, but that if a single copy is restrained for use in a criminal proceeding—as compared to mass seizures under civil injunction or destruction statutes—an *adversary* probable cause hearing is not required.

The fundamental absurdity of the Missouri Supreme Court's position is made clear by the effect of its holding on the statutory scheme of § 542.281. If petitioner were to apply today for a warrant to search a wholesale pornography warehouse such as that operated by respondent, the following result would obtain: following service of the notice of adversary hearing upon respondent, the court could only order respondent to keep in his warehouse one copy of each item named or described in the application (how it could be determined whether this order was being complied with in the absence of authority to search is an interesting question). During the adversary probable cause hearing and until the court issued its ruling, respondent would be entirely free to remove all materials from the warehouse except the specified single copies; in the present case, there were only 1,259 individual items out of the 28,000 magazines, books, films and other materials seized. Therefore, if the search warrant were granted, less than five percent of the pornographic material would be found there. Such a process is analogous to bailing a

sinking ship with a spoon, and petitioner submits that neither the First Amendment nor any decision of this Court mandates such a preposterous result.

The extent of respondent's reply in his various briefs and arguments in this case to the above citations of law has been to allege various defects in the *execution* of the seizure-and-destruction procedure in this case—for example, he claims that the search warrant herein was insufficiently specific in describing the things to be seized (citing *Lo-Ji Sales, Inc. v. New York, supra*), and that the jury hearing on the issue of obscenity was longer than the statutory maximum (citing *Marcus v. Search Warrant, supra*). The difficulty with these arguments is that they are *totally irrelevant* to the issue on which the Supreme Court of Missouri made its determination: whether the provision in § 542.281 for the ten-day restraint of First Amendment materials pending a judicial determination of probable cause to search is, *per se,* an impermissible prior restraint. These claims of various factual defects (respondent raised nine of them in his appeal) were fully briefed and argued by petitioner in the Missouri courts; however, their merit *vel non* was never reached because of the Missouri Supreme Court's ruling on the threshold issue of prior restraint.

Petitioner submits that the above facts and authorities conclusively demonstrate that the Supreme Court of Missouri has committed a serious and far-reaching error in its ruling on the issue of prior restraint. In order to remedy this disastrous misinterpretation of this Court's decisions, and to ensure that the same will not occur in other states, petitioner urges that this petition be granted.

CONCLUSION

In view of the foregoing, the petition for a writ of certiorari to the Supreme Court of Missouri should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MISSOURI,
Respondent,
v.
ALL STAR NEWS AGENCY, INC.,
Appellant.
(two cases)

No. 61317
Supreme Court of Missouri
En Banc
October 10, 1979

PER CURIAM:

This appeal involves a civil proceeding wherein the State seeks forfeiture and destruction under §§ 542.281 and 542.301, RSMo 1978, of allegedly obscene materials.

A Notice of Adversary Hearing was issued on June 6, 1977. On June 8, 1977, an adversary hearing on the probable obscenity of the items covered by the notice began. On June 16, 1977, the trial court found probable cause and a warrant issued. On July 8, 1977, a jury began its deliberations. On August 2, the jury returned verdicts finding most of the items obscene. On September 23, 1977, the trial court entered its declaration of forfeiture and order of destruction. An appeal was taken to the Eastern District of the Missouri Court of Appeals, where an opinion was filed and adopted on January 23, 1979.

On May 17, 1979, the cause was transferred to this Court by order of this Court. On September 17, 1979, it was argued and submitted.

On April 10, 1979, an opinion was filed and adopted in this Court in *State v. All Star News Agency, Inc.*, 580 S.W.2d 245 (Mo. banc 1979), which appeals involved civil proceedings in September, 1977. The State concedes that under the facts in this case, the opinion in *All Star, supra,* if still viable, requires reversal; but contends the opinion in *All Star, supra,* is flawed. We do not agree.

The judgment is reversed and the cause remanded for proceedings not inconsistent with the opinion in *State v. All Star News Agency, Inc.*, 580 S.W.2d 245 (Mo. banc 1979).

Bardgett, C.J., Donnelly, Seiler, Welliver, Morgan and Higgins, JJ., concur; Rendlen, J., dissents.

APPENDIX B

STATE OF MISSOURI,
Respondent,

v.

ALL STAR NEWS AGENCY, INC.,
Appellant (two cases).

Nos. 60609, 60616.

SUPREME COURT OF MISSOURI,
En Banc

April 10, 1979

Rehearing Denied May 17, 1979

PER CURIAM:

This appeal involves two civil proceedings, consolidated here and at trial, wherein the State seeks forfeiture and destruction, under §§ 542.281 and 542.301.3, RSMo Supp. 1975 of magazines and movies seized from appellant. Appellant was a wholesale distributor of magazines and movies in St. Louis.

The statutes involved provide a civil procedure whereby the State may search for, seize and destroy obscene material. In general terms they provide, where twenty or more items are at issue, for a four-stage process. First, upon application of the State to a court for a warrant to search for and seize obscene material, the dealer or exhibitor of the obscene matter must be given notice and an adversary hearing. Once notice is received, any removal or alteration of the material at issue is punishable by contempt. Second, an adversary hearing must be held before a search warrant for such material may issue. The purpose of the hearing is to determine whether there is probable

cause to believe that the material is located where alleged and will ultimately be found to be obscene. Third, if a warrant issues, a determination of obscenity is made by an advisory jury. Fourth, the trial judge determines, after the jury verdict, whether the material is obscene or not obscene as a matter of law. If the material is obscene, an order of forfeiture and destruction issues.

The proceedings at issue in this appeal are virtually identical except that one involves the seizure solely of movie films while the other involves the seizure solely of magazines. Over 1,000 films were seized. Nearly 13,000 magazines were seized.

The first proceeding was commenced on September 9, 1977, by issuance and service upon appellant of a Notice of Adversary Hearing. The notice listed the material for which a search warant was being sought and in substance stated, as provided by § 542.281.5, that "After service of notice of the hearing, intentional alteration, destruction, or removal of any matter, or duplicate of matter, described in the notice shall be punished as contempt of court." A police officer was stationed at appellant's warehouse to insure that no material was removed.

The adversary hearing began September 19, 1977. This proceeding involved movie films.

The second proceeding progressed similarly. It commenced on September 21, 1977, by issuance and service of a Notice of Adversary Hearing. The notice contained the same warning against removal or alteration of the material listed as in the proceeding involving movie films. A police officer was stationed at appellant's warehouse to insure that no material was removed. The adversary hearing was held September 23, 1977. This proceeding involved magazines.

The cases pertinent to this appeal are *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957); *Marcus v. Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); *A Quantity of Books, et al. v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); *Heller v. New York,* 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973); and *Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973).

[1-5] In our opinion, insofar as they pertain to the facts and issues on this appeal, the teachings of these cases are:

(1) that all materials alleged to be obscene are presumptively protected under the First Amendment.

(2) that, as a general proposition, no restraint on dissemination of presumptively protected material prior to a judicial adversary hearing on the question of probable obscenity is constitutionally permissible.

(3) that a prior restraint of one copy of each magazine or film alleged to be obscene may be permissible in order that a determination of the question of probable obscenity may be made.

(4) that the ultimate purpose of the taking of such copy (for use as evidence at a criminal trial; for use as evidence in an injunction proceeding; or for destruction) is irrelevant.

(5) that a restraint, prior to a judicial adversary hearing, of more material than is necessary for a determination of the question of probable obscenity is constitutionally impermissible.

(6). In the instant case, there were restraints of all copies of magazines and movies in the warehouse between the time the notices of adversary hearing were served

and the adversary hearings were held. There were prior restraints of materials presumptively protected under the First Amendment. This was constitutionally impermissible under the First, Fourth, and Fourteenth Amendments. Since a violation of these Amendments infected the proceedings, in order to vindicate appellant's constitutional rights the judgments must be reversed, and the causes remanded for further proceedings not inconsistent with this opinion. *Marcus,* supra, 367 U.S., l.c. 738, 81 S.Ct. 1708.

The judgments are reversed and the causes remanded.

MORGAN, C. J., and BARDGETT, RENDLEN, SIMEONE and WELLIVER, JJ., concur.

DONNELLY, J., concurs in separate concurring opinion filed.

SEILER, J., concurs and concurs in separate concurring opinion of DONNELLY, J.

DONNELLY, Judge, concurring.

These are the latest in a line of cases in which we deal with the question of obscenity by application of law announced by the United States Supreme Court. I concur, but, at the risk of being considered presumptuous, have some observations to make.

In *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), the United States Supreme Court began to seriously grapple with the question of obscenity. It would serve no useful purpose here for me to describe the twists and turns which culminated in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). It is enough to note that the author of *Roth* has reached the conclusion "that the time has come to make a significant departure" from the *Roth* approach. *Paris Adult*

Theatre I v. Slaton, 413 U.S. 49, 73, 74, 93 S.Ct. 2628, 2642, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting).

For me, the problem of regulating obscenity involves an attempt to reconcile two competing interests: the right *to speak freely* and the right *to privacy.* The right to speak freely needs no explication from me. It is the favorite of all libertarians and has properly dominated the thinking of our people throughout the history of our Nation. The right to enjoy life (from which the right to privacy derives) has not received the literary attention it deserves.

In December, 1890, Samuel D. Warren and Louis D. Brandeis noted that "in very early times, the law gave a remedy only for physical interference with life," but that later "there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone * * *." Warren & Brandeis, *The Right to Privacy,* 4 Harv.L.Rev. 193 (1890). Nearly thirty-eight years later, in different context, Mr. Justice Brandeis referred to "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

How does all of this relate to obscenity? In my view, unsolicited obscenity is an assault on the spiritual nature, the feelings and the intellect of the individual. It is an assault on the right to privacy. It is an assault on the right to be let alone. When a person is exposed to obscenity involuntarily, it violates "the right most valued by civilized men."

In my view, when obscenity is at issue, and a choice must be made between the right to speak freely and the right to privacy—the right to be let alone, the right to speak freely must yield.

If such concept were adopted, I would anticipate the following results:

(1) that obscenity would be protected by the First Amendment and that the right to communicate obscenity to prior consenting adults would be absolute. The right to be let alone can be waived and would be waived by prior consenting adults.

(2) that although obscenity were protected by the First Amendment, the right to communicate obscenity would be accommodated to the right of persons generally not to be exposed to it—to be let alone. This would give recognition to an overriding concern where state interests of protecting children and unconsenting adults were involved. *See Redrup v. New York,* 386 U.S. 767, 769, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967).

(3) that a new definition of obscenity would be adopted. If it were established law that the freedom to communicate obscenity to prior consenting adults is absolute, a definition of obscenity which would *fully* serve state interests of protecting children and unconsenting adults would seem appropriate. Certainly, limiting proscriptions of offensive material to hard-core pornography would be grossly inappropriate. *See Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

(4) that the essential problem in obscenity cases would shift from one of defining "obscenity" to one of defining "prior consent." Hopefully, this problem would prove less intractable.

(5) that any *prior restraint* on the right to communicate obscenity would violate the First Amendment. *See* Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp.Prob. 648 (1955).

Of course, the scholars will recognize that the concepts I espouse today emanate from the writings of Sir William Blackstone (4 *W. Blackstone, Commentaries* 151-152):

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects."

My views also reflect the provisions of the Missouri Constitution (Mo.Const. Art. I, §§2 and 8). However, it would serve no useful purpose to implement the Missouri Constitution so long as we are constrained by the approach of *Roth* and its successors.

On May 17, 1979, the Supreme Court of Missouri overruled the State of Missouri's timely motion for rehearing by making the following order: "Respondent's motion for rehearing and alternatively, motion for 90 day stay of mandate, overruled."

APPENDIX C

Section 542.281, RSMo 1975 Supp., reads as follows:

542.281. Obscene matter, search warrant for—transcript of proceedings—hearing on obscenity—alteration of material after notice of hearing prohibited.—1. Any police officer, sheriff or deputy sheriff may make application for the issuance of a search warrant to search for and seize:

(1) Obscene matter being held or displayed for sale, exhibition, distribution, or circulation to the public, if such matter is of such a nature that the average person, applying contemporary community standards would find that the matter, taken as a whole, appeals to the prurient interest, if the matter depicts or describes, in a patently offensive way, sexual conduct specifically defined by Missouri law as obscene, and if the matter, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(2) Property which has been used by the owner, or used with his consent, as a raw material or as an instrument to publish or produce such obscene matter.

2. A warrant to search for obscene matter being held or displayed for sale, exhibition, distribution, or circulation or for property which has been used as a raw material or as an instrument to publish or produce such obscene matter may be issued by a judge of the circuit court in the county or judicial district in which the alleged matter or property is located. Except as provided in this section, the issuance of a warrant to search for and seize obscene matter shall be governed by the provisions of section 542.276.

3. A copy or photograph of the allegedly obscene matter may be annexed to the application. The application and the warrant, if issued, shall designate precisely by

title, or otherwise, each item or type of item to be searched for and seized. No warrant shall be issued to search for and seize any item or type of item unless the judge determines there is probable cause to believe that each item or type of item sought is obscene as defined by law, and is being held or displayed for sale, exhibition, distribution, or circulation to the public.

4. A transcript shall be made of all proceedings under this section and under subsections 3 and 4 of section 542.301.

5. If more than twenty items are to be seized, or if the item to be seized is a motion picture film being exhibited to the public, the judge shall hold an adversary hearing to determine whether such matter is obscene before issuing a warrant. Not less than twenty-four hours before such hearing, written notice of the date, time, place and nature of the hearing, including a description of the matter sought, shall be personally served upon the dealer, exhibiter, displayer or his agent. No warrant shall be issued without the dealer, distributor, or displayer being given a reasonable opportunity to appear in opposition to the issuance. Except when the dealer, exhibiter, or displayer consents to a longer period, or by his actions or pleadings, willfully prevents the prompt resolution of the hearing, a decision shall be rendered no later than ten days from the date of the commencement of the hearing. The hearing shall determine whether the average person, applying contemporary community standards would find that the matter sought, taken as a whole, appeals to the prurient interest, whether the matter sought depicts or describes, in a patently offensive way, sexual conduct specifically defined as obscene by the laws of this state, and whether the matter sought, taken as a whole, lacks serious literary, artistic, political, or scientific value. Upon determination

that there is probable cause to believe the matter sought is obscene, the judge shall issue a warrant to search for and seize it. After service of notice of the hearing, intentional alteration, destruction, or removal of any matter, or duplicate of matter, described in the notice shall be punished as contempt of court.

542.286. Warrant to be executed within territorial jurisdiction, exception.—1. A warrant to search a person or any movable thing may be executed in any part of the state where the person or thing is found if, subsequent to the filing of the application, the person or thing moves or is taken out of the territorial jurisdiction of the judge issuing the warrant.

2. All other search warrants shall be executed within the territorial jurisdiction of the court out of which the warrant issued and within the territorial jurisdiction of the officer executing the warrant.

Section 542.301, RSMo 1975 Supp., reads in pertinent part as follows:

542.301. Disposition of unclaimed seized property-forfeiture to the state, when-allegedly obscene matter, how treated-appeal authorized.

. . . .

3. (1) When a warrant has been issued to search for and seize allegedly obscene matter after an adversary hearing, the judge, upon return of the warrant with the matter seized, shall give notice of the fact to the prosecuting attorney of the county in which the matter was seized and the dealer, exhibiter, or displayer and shall conduct further adversary proceedings to determine whether the matter is subject to forfeiture. If the evidence is clear and convincing that the matter is obscene as de-

fined by law and it was being held or displayed for sale, exhibition, distribution, or circulation to the public, the judge shall declare it to be obscene and forfeited to the state and order its destruction. However, no forfeiture shall be declared without the dealer, distributor, or displayer being given a reasonable opportunity to appear in opposition and without the judge having thoroughly examined each item. Except when the dealer, exhibiter, or displayer consents to a longer period, or by his actions or pleadings willfully prevents the prompt resolution of the hearing, judgment shall be rendered within ten days of the return of the warrant. If the matter is not found to be obscene or is not found to have been held or displayed for sale, exhibition, or distribution to the public, or a judgment is not entered within the time provided for, the matter shall be restored forthwith to the dealer, exhibiter, or displayer.

(2) If an appeal is taken by the dealer, exhibiter, or displayer from an adverse judgment, the case should be assigned for hearing at the earliest practicable date and expedited in every way. Destruction of a matter declared forfeited shall be postponed until the judgment has become final by exhaustion of appeal, or by expiration of the time for appeal, and until the matter is no longer needed as evidence in a criminal proceeding.

(3) A determination of obscenity shall not be admissible in any criminal proceeding against any person or corporation for sale or possession of obscene matter.

4. (1) When allegedly obscene matter has been seized under a search warrant issued without a prior adversary hearing, or has been seized without a warrant, the officer, who executed the warrant or seized the matter without warrant, shall give notice of the fact of seizure to the prosecuting attorney of the county in which the

matter was seized. Within three days of the seizure the prosecuting attorney shall file a written motion with the circuit court of the county or judicial district in which the seizure occurred praying for an order directing the forfeiture of the matter. Upon filing of the motion, the court shall set a date for a hearing. Written notice of date, time, place, and nature of the hearing shall be personally served upon the owner, dealer, exhibiter, displayer, or his agent. Such notice shall be served no less than five days before the hearing.

(2) If the evidence is clear and convincing that the matter is obscene as defined by law, and it was being held or displayed for sale, exhibition, distribution, or circulation to the public, the judge shall declare it to be obscene and forfeited to the state and order its destruction. However, no forfeiture shall be declared without the dealer, distributor, or displayer being given a reasonable opportunity to appear in opposition and without the judge having thoroughly examined each item. Except when the dealer, exhibiter, or displayer consents to a longer period, or by his actions or pleadings willfully prevents the prompt resolution of the hearing, judgment shall be rendered within fifteen days from the date of the seizure. If the matter is not found to be obscene, or is not found to have been held or displayed for sale, exhibition, distribution, or circulation to the public, or a judgment is not entered within the time provided for, the matter shall be restored forthwith to the dealer, exhibiter, or displayer.

(3) If an appeal is taken by the dealer, exhibiter, or displayer from an adverse judgment, the case shall be assigned for hearing at the earliest practicable date and expedited in every way. Destruction of matter declared forfeited shall be postponed until the judgment has become final by exhaustion of appeal, or by expiration of the time

for appeal, and until the matter is no longer needed as evidence in a criminal proceeding.

(4) A determination of obscenity shall not be admissible in any criminal proceeding against any person or corporation for sale or possession of obscene matter.

5. An appeal by any party shall be allowed from the judgment of the court as in other civil actions.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-683

STATE OF MISSOURI,
Petitioner,

vs.

ALL STAR NEWS AGENCY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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OPINIONS BELOW

The opinion of the Supreme Court of Missouri en banc reversing the judgment below, as yet unreported, is styled and numbered as, *State of Missouri* v. *All Star News Agency, Inc.*, ____ S.W.2d ____ (Mo.banc No. 61317, delivered October 10, 1979). The opinion is reproduced as Appendix A of Petitioner's Petition for Writ of Certiorari.

In a related case, on April 10, 1979, an opinion was filed by the Supreme Court of Missouri in *State of Missouri* v. *All Star News Agency, Inc.*, 580 S.W.2d 245 (Mo.banc 1979), which appeals involved civil proceedings between the same parties and

with similar facts. That case is also pending in this Court awaiting a ruling on the State's Petition for a Writ of Certiorari in case number 79-241.

The opinion is reproduced as Appendix B of Petitioner's Petition for Writ of Certiorari.

JURISDICTION

Respondent accepts Petitioner's jurisdictional statement.

QUESTION PRESENTED

Whether the total prohibition of All Star News Agency, Inc.'s, ability to continue to sell and distribute magazines and movies from the time of the service of a Notice of Adversary Hearing by the State constituted an illegal prior restraint of materials presumptively protected under the First Amendment in violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

This petition deals with a proceeding wherein the State of Missouri sought the forfeiture and destruction of approximately two thousand films and twenty-six thousand magazines from the premises of All Star News Agency of St. Louis, Inc. (hereinafter referred to as All Star), located at 3721 Washington Avenue, St. Louis, Missouri.

Briefly, the materials were seized pursuant to a search warrant. Prior to the issuance of the warrant, a Notice of Adversary Hearing was served on All Star and an adversary hearing was conducted. Thereafter, the warrant was executed, seizures made, a motion to quash the warrant was heard and overruled, and the case was tried. Most of the items were shown to an advisory jury which declared almost all to be obscene by less than unanimous verdicts. The Court then made an independent

determination and agreed with the jury's findings on all but a few items. The Court then issued a Declaration of Forfeiture and Order for Destruction which was stayed pending appeal by All Star.

The relevant facts are as follows: on June 6, 1977, the State of Missouri requested the Circuit Court to issue a Notice of Adversary Hearing pursuant to the provisions of §542.281, R.S.Mo. 1975. The notice listed 147 items by name or otherwise. Item 148 was a general category which stated, "And all other items contained in and on the premises commonly known as 3721 Washington, St. Louis, Missouri, which are of a type, nature and description, similar to the aforesaid items Number 1 through 147". The notice also stated that intentional alteration, destruction or removal of any matter, or duplicate of matter, described in the notice, shall be subject to contempt of court proceedings. After serving the notice, police officers were stationed in the immediate area outside the premises to insure that no materials were taken from the warehouse (Tr.233-234). The police remained there 24 hours a day until the search warrant was executed (Tr.234).

The adversary hearing began on June 8, 1977 (Tr.1). Prior to the taking of testimony, counsel for All Star filed a Memorandum in Opposition to Issuance of Search Warrant (Tr.5-7), which was argued and overruled (Tr.9). The State did agree to amend the notice in regards to Item 148 (Tr.9). The notice was amended twice, each time over All Star's objection (Tr.19, 33-41, 105). Testimony commenced on June 8, and various police officers testified and filed written affidavits in support of their testimony (Tr.44-192).

After the completion of all testimony, counsel made oral agruments to the Court (Tr.212). Prior to issuing its ruling, the Court examined all items, numbered 1-147, in the Application for Search Warrant. Counsel for All Star argued that if a search

warrant issued it should be limited to the specific items viewed by the Court. On June 16, 1977, the Court entered its Memorandum Opinion ordering the search warrant issued for the 147 items specifically listed, and including the catch-all provision heretofore mentioned (Tr.212-221).

Executon of the search warrant commenced on June 16, 1977 (Tr.221). Out of the 147 items listed in the search warrant (magazines, movies and rubber items), 86 were found in the warehouse (Tr.245). In all, over 2,000 movies and 26,000 magazines were seized pursuant to the search warrant. Except for the 86 items viewed by the Judge (and any duplicates thereof), the remaining items and their duplicates which were ultimately seized were not viewed during this adversary hearing, and they were not viewed by anyone until the jury saw them some weeks later.

On July 5, 1977, testimony was taken on the Motion to Quash the search warrant (Tr.232) and the hearing on the motion disclosed the following facts: upon entering the All Star premises on June 16, and after reading of the search warrant was waived, Detective Sergeant Vincent Stehlin began to examine the contents of each book and magazine (Tr.240). Sgt. Stehlin stated that he made all determinations of what was to be seized; that he went through every magazine in the warehouse and designated what was to be seized and what was not to be seized (Tr.242, 249, 250-254). In reaching his determination, he would view the contents; if it appeared to be, or was an item seized where he had previously made arrests in bookstores and had convictions, if it either was the name of a book mentioned in the search warrant or a similar book, or if it was all pictures of sexual intercourse, sodomy, or unnatural acts, he seized the book (Tr.252). If he felt the materials fell within the contents of the search warrant, he seized it; if he did not, he told officers not to seize it (Tr.253). It would usually only take him a few seconds to look at a magazine and reach his decision on whether or not to seize it (Tr.262).

Det. Roy Joachimstaler was in charge of the movie room (Tr.247, 260). Although all of the movies found on the premises were seized, none were viewed prior to their seizure (Tr.260, 261). Some of the movies had a catalog taped to the front, some had pictures on the boxes, and some had nothing other than a title (Tr.260-262).

On July 8, 1977, after the jury was selected, the motion to quash was further discussed in chambers (Tr.292). Counsel for All Star pointed out that a comparison of the State's Exhibit List to the return of the search warrant indicated that 208 films were of a different brand than those examined by the Court during the Adversary Hearing (Tr.295-296). The Court never actually ruled on the motion to quash, but stated it would take the matter under advisement (Tr.296) and the trial began.

Presentation of the evidence commenced on July 8, 1977. All Star preserved its objections to the introduction of the evidence at trial (Tr.311, 314, 371, 352). It was during this three-week jury trial that for the first time the more than 26,000 magazines and 2,000 films seized by virtue of the general category were viewed.

On August 2, 1977, the jury concluded its deliberations and returned its verdicts, declaring most of the items to be obscene by less than unanimous verdicts. These verdicts, some seven and a half weeks after the items were seized, constituted the first determination as to the nature of the item seized pursuant to the general categories in the warrant. The trial judge entered his opinion and order on September 23, 1977 (Tr.372-350).

After hearings were concluded on post-trial motions, notices of appeal were duly filed to the Missouri Court of Appeals, St. Louis District, where an opinion was filed on January 23, 1979. On May 17, 1979, the cause was transferred to the Supreme Court of the State of Missouri, and was argued and submitted to that Court on September 17, 1979. The Supreme Court of

Missouri, en banc, reversed and remanded in an opinion rendered on October 10, 1979, holding that the procedures followed by the State constituted an illegal prior restraint of materials presumptively protected by the First Amendment of the Constitution of the United States. Thereafter, the State's motion for rehearing was denied, and the State filed its Petition for Writ of Certiorari to the Supreme Court of Missouri with this Court.

ARGUMENT

On June 6, 1977, a Notice of Adversary Hearing was served upon the "owner-manager-employees of All Star News Agency". This notice contained 147 specifically delineated titles concerning magazine publications, movies and rubber products. At the time of the service the notice also contained an item 148 which was in the nature of a "catch-all" phrase which read, "and all other items contained in and on the premises commonly known as 3721 Washington, St. Louis, Missouri, which are of a type, nature and description similar to the aforesaid items, number 1 through 147". This notice goes on to recite the language of §542.281, Paragraph 5, R.S.Mo., as follows:

> "After receipt of this notice of the hearing intentional alteration, destruction or removal of any matter, or duplicate of matter described in this notice shall be sought to 'contempt of court' proceedings."

As a result of this notice, All Star was effectively out of business until its stock was seized during the execution of the search warrant.

The State conceeds that under the facts in this case, the opinion of the Supreme Court of Missouri in *State* v. *All Star News, Inc.*, 580 S.W.2d 245 (Mo banc 1979), is controlling. Consequently, this Court's action in granting or denying certiorari in case number 79-241 will have direct application to the instant proceedings.

In its Petition, the State has alleged that (l.c.7):

> "The crux of the Missouri Supreme Court's holding in this and in previous *All Star* cases is that the provision in §542.281.5, R.S.Mo. 1975 Supp., which prohibits the alteration, destruction or removal of materials described in the application for search warrant during the maximum

ten-day period between the application constitutes an impermissible prior restraint which violates the distributor's First Amendment rights."

Though the Respondent has consistently urged this holding both in this and in prior *All Star* cases, a plain reading of the opinion of the Supreme Court of Missouri will show that it has not, as of yet, reached this issue.

Respondent would contend that §542.281 to 542.301, inclusive R.S.Mo., are unconstitutional as they result in the imposition of an absolute prior restraint on materials which are presumptively protected, and afforded the protections under the First and Fourteenth Amendments of the Constitution of the United States and Article I, Section 8 of the Constitution of the State of Missouri. In *Roaden* v. *Kentucky,* 413 U.S. 496, 504 (1973), this Court stated, ". . . prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness."

In the instant cases, specifically enumerated items were examined by the issuing judge, but the notice contained a general category, and this general category related back in language that is incapable of precise meaning. Not only did All Star face the potential threat of contempt of court for selling a magazine or movie that was not specifically named in the notice, as provided by Statute, supra, but its right to so traffic in these materials was totally restricted by the presence of police officers at the entrances and exits to the premises occupied by All Star. Furthermore, and perhaps most importantly, the great majority of the items finally seized were in the general category and were not examined by either a judge or a jury for several weeks after the initial seizure. During all this time, All Star was unable to sell the materials and the public was deprived of its right to obtain them. The Missouri Supreme Court realized that the approach the State took in this case was more effective than any injunction that could have been obtained. The procedure which was

devised by the State was designed to side-step the procedural safeguards guaranteed to the respondent by the Constitution of the United States, as noted. The specificity requirement as set forth in *Miller* v. *California,* 413 U.S. 15 (1973), is definitive of the inadequacy of the general "catch-all" provisions and their ultimate affect as contained in the notices in the case at bar.

In the landmark case of *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961), this Court discussed the impropriety of a prior statutory procedure in Missouri which permitted a prior restraint of presumptively protected materials. The Court stated (l.c.736-738):

> "But there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. An opportunity comparable to that which the distributor in Kingsley Books might have had to circulate the publication despite the interim restraint and then raise the claim of non-obscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away. Their ability to circulate their publications was left to the chance of securing other copies, themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is con-

stitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes it from him. Finally, a subdivision of the New York statute in Kingsley Books required that a judicial decision on the merits of obscenity be made within two days of trial, which in turn was required to be within one day of the joinder of issue on the request for an injunction. In contrast, the Missouri statutory scheme drawn in question here has no limitation on the time within which decision must be made, only a provision for rapid trial of the issue of obscenity. *And in fact over two months elapsed between seizure and decision.* In these circumstances the restraint on the circalculation (sic) of publications was far more thoroughgoing and drastic than any restraint upheld by this Court in Kingsley Books." (Emphasis added)

The concept of the seizure itself is contrary to *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973), in that before the final hearing all merchandise and items in question may be seized or effectively restrained from sale. The general inclusions of the "catch-all" category without any specificity to it creates a situation whereby there is not a determination of those matters until the ultimate jury trial. A period of time necessarily had to pass where the recipient of the notice is subject to the penalties of contempt based upon vague and imprecise descriptions of a category of material that he might sell at its own risk. However, in these cases the Petitioner removed even this possibility of continued circulation of books and films by placing police officers at all entrances and exits of the respondent's warehouse; nothing was brought in or out throughout the execution of the warrant. The notices were served on June 6, 1977, but the jury's verdict was not rendered until August 2, 1977, and the Court's decision entered on September 23, 1972. (Tr. 350 et seq.). Hence, contrary to Petitioner's assertions, there was in fact ap-

proximately four (4) months of total suppression even though some items were later found not obscene and protected. While it is now clear that the government can regulate the sale of obscene material, it is equally manifest it can do so only, ". . . under the procedural safeguards designed to obviate the dangers of censorship system." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 559 (1975). One of the primary safeguards is a "prompt final judicial determination" that the material to be censored is, in fact, obscene. See also *Freedman* v. *Maryland,* 380 U.S. 51 (1965). In the absence of a prompt, prior judicial determination any action which abates or censors the exhibition of films or magazines violates the constitutional principle against prior restraint of presumptively protected material. *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 367 (1971); *Freedman* v. *Maryland, supra,* at page 58; *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957).

Put very directly and simply, the sale or distribution of any material can not be restrained in any form or manner and especially by threat of contempt without a court first making a specific determination that the particular item, be it a newspaper, magazine, film or any media, is obscene. Actual physical restraint compounds the constitutional invalidity of the procedure.

Near v. *Minnesota ex rel. Olson,* 283 U.S. 697 (1931), is directly on point. The statute in question in *Near* did not require approval of all publications before distribution. Rather, it allowed a court to enjoin the publication of a "malicious, scandalous and defamatory" newspaper (see page 702). The injunction was issued after Near had published nine (9) such newspapers. On appeal, the Supreme Court struck the statute down because it allowed a restraint of future publications based on the offensiveness of past publications. Similarly, here, the threat of contempt chilled the respondent's right to sell movies or magazines prior to any final determination of obscenity vel non.

The distinction between restraint based on judgment that specific material is obscene and prior restraint without such adjudication is clearly drawn in *Kingsley Books, Inc.* v. *Brown, supra* (l.c. 445):

> "It only remains to say that the difference between *Near* v. *Minnesota,* 283 U.S. 697, 75 L.Ed. 1351, 51 S.Ct. 625, supra, and this case is glaring in fact. The two cases are no less glaringly different when judged by the appropriate criteria of constitutional law. *Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive.* In the language of Mr. Chief Justice Hughes, *'This is of the essence of censorship.'* 283 U.S. 713. As such, it was found *unconstitutional.* This was enough to condemn the statute wholly apart from the fact that the proceeding in *Near* involved no obscenity but matters deemed to be derogatory to a public officer. Unlike *Near,* Section 22-a concerned solely with obscenity and, as authoritatively construed, it *studiously withholds restraint upon matters not already published and not yet found to be offensive."* (Emphasis added).

Beyond doubt, there is no "studious restraint upon matters not already published and not yet found to be offensive." Respondent is unable to impose any such constitutional restraint upon itself.

An examination of relevant decisions from other jurisdictions will show the blatant illegality of the procedure employed by the State. That these statutes may be employed by the Petitioner to "censor" and "restrain" future sales of books, magazines and films by threat of contempt of court and the use of police officers, and be allowed to so function for a period of some four (4) months before a final judicial determination is made was the compelling reason for the Missouri Supreme Court to find the

procedures employed to be in violation of the First, Fourth and Fourteenth Amendments of the Constitution of the United States.

The facts in the cases at bar should be compared with those as discussed in *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973), wherein those proceedings forbade the removal of films until the date of hearing but allowed their continued exhibition. The Court approved that scheme only because there was an allowed continued exhibiton of the materials or films until such time as there was a prompt and final judicial determination. The decision of this Court in *Kingsley Books, supra,* stands for the proposition that books or films may not be enjoined until there has been an individual determination of obscenity. Accord: *Organization For a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). The result of Petitioner's actions was to reverse the concept of presumptive protection of First Amendment materials to censorship by the State pending judicial affirmation, an action which the Supreme Court of Missouri recognized as improper.

In support of its holding in the first All Star case, the Supreme Court of Missouri cites five "teachings" which are apparent in the decisions of this Court on the subject of obscenity. *State* v. *All Star News Agency, Inc., supra,* at 247. Petitioner specifically points to the third of these five teachings which Petitioner claims is a holding by the Supreme Court of Missouri that the First Amendment prohibits the restraint of more than one copy of a given item. (Petitioner's Petition page 11). In so claiming, the State has apparently misread the holding of the Missouri Supreme Court.

In that regard, the Missouri Supreme Court held ". . . that a prior restraint of one copy of each magazine or film alleged to be obscene may be permissible in order that a determination of the question probable obscenity may be made." *All Star,* supra, at 247. This Court, in discussing its prior decision in the case of *Heller* v. *New York,* 413 U.S. 483 (1973) has recently stated:

"We also cannot accept the State's contention that it acted in compliance with *Heller* v. *New York,* 413 U.S. 483 (1973). There, based on police reports of probable violation of state law, a judge viewed a film in a theatre as an ordinary paying parton; on the basis of his observation of the entire performance he then issued a warrant for the seizure of the particular viewed film as evidence. There was no claim that the seizure of the single copy impeded the exhibitor's continued business pending decision on the issue of obscenity. *Heller's claim was that not even one of his films could be seized without a prior adversary hearing.* We rejected that claim . . ." (emphasis added) *Lo-Ji Sales Incorporated* v. *New York,* ____ U.S. ____, 99 S.Ct. 2319 (1979).

Respondent would contend that *Heller* v. *New York, supra,* and *Lo-Ji Sales, Inc.* v. *New York, supra.,* constitutes ample authority for the Missouri Supreme Court to make the simple declaration that under the proper circumstances the prior restraint of one copy of a magazine or film alleged to be obscene may be permissible in order that a determination of the question of probable obscenity may be made.

While the Court states that the prior restraint of one copy is permissible, it does not necessarily follow that in all circumstances the restraint of more than one copy is impermissible. In any event, such a declaration is unnecessary to the Court's holding. The case at bar is precisely like the cases presented to this Court in *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964) and *Marcus* v. *Search Warrant, supra.,* in that this case concerns the seizure of a mass quantity of books and films for the sole purpose of their destruction. This Court has held that in those circumstances, a prior judicial determination of obscenity in an adversary proceeding is required to avoid ". . . dangers of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books." *A*

Quantity of Books v. *Kansas, supra,* at 213. This holding was reaffirmed by this Court in *Heller* v. *New York, supra.,* at 491.

The extent of the Petitioner's attacks on the opinions below reveal its fundamental misunderstanding on those opinions. It appears to be the State's position that the Supreme Court of Missouri held that the provision of §542.281, R.S.Mo., for the ten day restraint of First Amendment materials pending the judicial determination of probable cause to search is, per se, an impermissible prior restraint. A plain reading of the opinion clearly demonstrates that there was no such holding.

The opinion below can be divided into five basic parts: a brief statement as to the nature of the proceding; a summary of the facts presented to the court; a citation to controlling law and brief statement of the general principles for which they stand; a conclusion that the facts presented to the Court constituted an impermissible prior restraint in violation of the First, Fourth and Fourteenth Amendments; and a determination that, "Since a violation of these Amendments infected the proceedings, in order to vindicate appellant's constitutional rights the judgments must be reversed, and the causes remanded for further proceedings not inconsistent with this opinion." *State* v. *All Star News, Inc., supra,* at 248.

Though Respondent has consistently urged, and still urges, that the provisions in §542.281, R.S.Mo., constitutes a *per se* unconstitutional prior restraint, the Supreme Court of Missouri has not so held. The Missouri Supreme Court's ruling is merely a determination that, under the facts of the instant case "(T)here were prior restraints of materials presumptively protected under the First Amendment." *All Star, supra,* at 247.

The State decries the alleged effect of this holding, making the point that absent the prohibition against the removal of the films and/or magazines the items might be destroyed or removed to another jurisdiction. This precise argument was made

by counsel for Kentucky in *Roaden* v. *Kentucky, supra,* and counsel for New York in *Heller* v. *New York, supra.,* and has been specifically rejected by this Court, *Roaden* v. *Kentucky, supra,* at 505 n.6, in which this Court stated that ". . . procuring a warrant based on a prior judicial determination of probable cause of obscenity need not risk loss of evidence."

In addition, Respondent would show the Court that the search warrant issued in the instant case was nearly indentical to the *Lo-Ji* warrant. The warrant contained an enumerated list of items but then included a general catch-all category which began with the vague and overbroad clause, "Other magazines, books, motion picture films, photographs, pictures or publication, which depict, describe or portray . . .,". The warrant listed 147 items. Yet the executing officers used this warrant to seize over 26,000 magazines and 2,000 films (Tr.245). By admission only 86 of the thousands of items seized were specifically listed in the warrant. (Tr.245). This was not a search for the materials specifically listed in the warrants. The executing officer used the general category of the warrant as a justification to replace the ruling of the trial court with his own discretion in interpreting the warrant. The officer who supervised the execution of the warrant testified that items were seized if he felt that they were obscene (Tr.253).

In *Lo-Ji,* this Court stated (l.c. 99 S.Ct.2324):

> ". . . the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action. Roaden v. Kentucky, 413 U.S. 496, 502, 93 S.Ct. 2796, 2800, 37 L. Ed. 2d 737 (1973); Stanford v. Texas, supra, 379 U.S. at 485, 85 S.Ct., at 511; Marcus v. Search Warrant, supra, 367 U.S., at 732, 81 S.Ct., at 1716."

Because it held that there was an illegal prior restraint the Missouri Supreme Court did not reach the merits of Respondent's contentions that the search and seizure herein was clearly improper. Should this Court grant Petitioner's Writ of Certiorari and remand the case to the Missouri Supreme Court, Respondent submits that *Lo-Ji Sales, Inc.* v. *New York, supra,* would be controlling.

CONCLUSION

For the foregoing reasons, we respectfully suggest that the Petition for Certiorari be denied.

Respectfully submitted,

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